NO. 2023

IN

The United States Circuit Court of Appeals

For the Ninth Circuit

H. L. E. MEYER, GEORGE H. C. MEYER, H. L. E. MEYER, JR., JOHN WEDDERBURN WILSON, and JOHN M. QUAILE, Partners doing business as MEYER, WILSON & COMPANY,

PLAINTIFFS IN ERROR

VS.

EVERETT PULP & PAPER COMPANY,

DEFENDANT IN ERROR

Brief on Behalf of Defendant in Error

UPON WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

J. A. COLEMAN
Attorney for Defendant in Error

Herald Press, Everett, Wash.

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Plaintiffs in Error.

v.

EVERETT PULP & PAPER COMPANY,

Defendant in Error.

Brief on Behalf of Defendant in Error

STATEMENT

The plaintiffs in error conduct a general exporting and importing business, and among other products handle

china clay. The defendant is operating a paper mill at Everett, Washington, and uses china clay in paper making. The purpose of the clay is to act as a filler between the wood fiber to make a smooth sheet and one that will take an ink impression without blotting. To be suitable for this purpose the clay must be of uniform white color and free from grit and sand.

The plaintiffs in error having been informed that the defendant in error desired to buy china clay suitable for use in the making of the character of paper manufactured by it, wrote the defendant on September 29, 1906 (Trans. p. 50) a letter in which they said: "referring to the cor-"respondence we have had heretofore with you regarding "china clay, we now have the pleasure of advising you "that we send you under separate cover a sample marked "'P. X. Y.' of an English China Clay which the makers "believe matches your own sample very well and we trust "that you will find it so. It is probable that we could "work your order for a quantity of not less than 400 to "500 tons of this P. X. Y. China Clay in one half ton "casks etc", to which letter the defendant in error replied on October 11, 1906 (Trans. 52.): "Please enter our order "for 3-400 tons of P. X. Y. China Clay to be fully equal "to the sample which you have submitted to us, at the "price etc." On October 15, 1906, the plaintiffs in error signed and sent the defendant in error a written memorandum which defendant in error signed and which is as follows: (Trans. 32)

"PLAINTIFFS' EXHIBIT 'A'

"ORIGINAL

"Meyer, Wilson & Co.,
"Portland, Oregon.
"Meyer, Wilson & Co.,
"San Francisco, Cal.
"Wilson, Meyer & Co.,
"Liverpool.

Received
Oct. 17, 1906.
Everett Pulp &
Paper Co.

Portland, Oregon, October 15, 1906.

"Messrs. Everett Pulp & Paper Co.,
"Everett, Wash.

"Bought of MEYER, WILSON & Co.

"Terms Nett Cash 338 Sherlock Building.

"Payable in U. S. Gold Coin
"as delivered.

"About Three Hundred (300) to Four Hundred "(400) tons of 2240 lbs. each, China Clay in casks, P. X. "Y. brand at Seventy Cents (70cts.) per 100 lbs. net "invoice weight ex ship at Seattle, Wash.

"This sale is made for shipment per 'Mozambique' from "Leith or Tyne (P. M. W. & Co. A. T.) to Seattle. Pur- "chasers to take delivery of China Clay from alongside "vessel at once on discharged at Seattle, Wash.

"Sellers not responsible for results (as affecting this "agreement) of strikes, accidents, lockouts, breakdown of "machinery, failure of manufacturers or suppliers, or any "other circumstances beyond their control.

"Contract void if vessel be lost, or for any portion or "all of the China Clay which may fail to reach Seattle, "owing to perils of the Sea, or other causes beyond seller's "control.

"This sale is based on the present tariff. Any change "in the rate of duty payable to the U. S. Government to be "for account of purchasers.

"China Clay at risk of purchasers as soon as landed.

"Wharfage, if any, at Seattle, Wash., to be for account "of purchasers. Pr. Pro. MEYER, WILSON & Co.
"approved. Alfd. Tucker,
"Sellers.
"EVERETT PULP & PAPER Co.,
"Augustus Johnson, Secretary,
"Approved. Purchasers."

"P. X. Y." brand has no defined meaning in the trade. For all that appears that name was applied arbitrarily to designate the particular sample submitted to the defendant by the plaintiffs, and there is nothing to show that the term was ever applied before or since to designate a kind or quality of clay.

Upon the arrival of the Mozambique at Seattle, the defendant did not inspect the clay to ascertain its quality before receiving it, because inspection at that time and place was impossible.

The trial court made no special findings of fact, but the general findings contained in the decision show what occurred before and after the arrival of the Mozambique. Said the court: (Trans. 22-24.)

"The contract for the sale of the clay was made by cor- "respondence between the parties and as construed by the "Court, it is a contract for a sale by sample, and there is "an implied warranty of quality corresponding to the "sample referred to in the correspondence. 15 Am. & Eng. "Enc. of Law (2nd Ed.) p.p. 1225-6. The clay was bought

"in England and transported by ship to Seattle, and there "is no dispute between the parties, as to the quantity of "the clay shipped and delivered, nor as to the contract "price which the defendant promised to pay therefor. It "is admitted also that payment of the purchase price has "been demanded and refused, except as to part, and other "jurisdictional facts are admitted. The contract, as con- "strued by the Court, obligated the defendant to receive "the clay from the ship, which condition precluded in- "spection by the purchaser before delivery. This is so for "the reason that, clay to be of the quality warranted, must "be of uniform white color and free from grit, and to "determine the quality, time, favorable conditions, and "special conveniences for testing are necessary, and these "essentials make a fair inspection while the ship is being "discharged, impracticable. The defendant did not in fact "inspect the clay to ascertain its quality before receiving "it, but afterwards ascertained that it came from two dif- "ferent sources of supply and that it is not uniform in "quality, 800 barrels thereof being inferior to the sample "and unsuitable for the defendant's use. The defendant "used and has tendered payment at the contract rate for "861 barrels, and disputes its liability to pay for 800 "barrels because of the inferior quality thereof. The "plaintiff's contention is that notwithstanding the inferior "quality of 800 barrels of the clay, the defendant accepted "delivery of the entire consignment, and by doing so "waived its right to reject any part of the same. The "defendant did not intend a waiver of its right to have "delivered that which it had agreed to buy and pay for, "viz: Clay of the same quality as the sample. On the "contrary, it was prompt in giving notice to the plaintiffs "of the inferior quality of the clay, and has acted fairly "towards them in minimizing the loss by making use of, "and tendering payment for, all of the clay fit for use and "by holding the rejected portion subject to the plaintiff's "right to dispose of it. The plaintiff's contention is

"founded upon the false idea that the defendant was "legally bound to either accept the commodity of which "delivery was tendered, and pay the contract price for all "of it, regardless of its quality, or else refuse to receive "possession of it. This idea is contrary to the rule of law "applicable to the case, because, it ignores the implied "warranty upon which the defendant has a right to rely. "The defendant acted within its legal rights in taking pos- "session of the clay and resisting the plaintiff's demand "for the price of the portion inferior to the sample. In "this country the rule is well established by numerous "decisions of the Courts, that a breach of an implied war- "ranty of quality entitles the vendee to retain the goods "and when sued for the purchase price, to set up the "breach of warranty to reduce the sum recoverable by the "vendor. 15 Am. & Eng. Enc. of Law (2nd Ed.) p. 1255; "24 Id. p. 1158; Saunders v. Short 86 Fed. Rep. 225; "Andrews v. Schreiber, 93 Fed. Rep. 367; Florence Oil & "Refining Co. v. Farrar, 109 Fed. Rep. 254. The measure "of damages which the vendee may claim for breach of an "implied warranty of quality is the difference between the "actual value of the property delivered and the higher "value of the warranted quality; and if there is no other "evidence of value, the price agreed to be paid will be "regarded as the value of the property of the quality war- "ranted. In this case the defendant having offered to "return the inferior clay and to hold it subject to disposi- "tion by the plaintiffs, the contract price is the measure "of damages which it is entitled to recoup."

ARGUMENT

The plaintiffs in error contend:

1. That the sale was not by sample, but that the letters of the plaintiffs submitting the sample and the letter of the defendant giving its order by sample were merged in the memorandum contract executed by the parties in

which no reference to the sample was made, but in which the clay to be sold was described as "P. X. Y. brand"; and hence the trial judge erred in permitting it to introduce in evidence the sample and the letters referring thereto.

2. That whether the sale was by sample or not or whether a P. X. Y. brand of clay was furnished or not, the taking of the clay from the ship was such an acceptance as bound the defendant to pay the contract price for the whole consignment.

3. That the evidence relating to the meaning in the trade of "delivery ex ship" and the evidence relating to the custom in the trade in regard to delivery of clay was improperly admitted.

4. Insufficiency of defendant's answer.

The defendant contends:

1. The sale was by sample. The term "P. X. Y." did not designate any generally recognized quality of clay among the trade or in itself convey any meaning to the defendant. The term was an arbitrary designation given to the particular sample which furnished the basis of the contract, and hence proof of the sample and the correspondence in relation thereto was not only proper but necessary.

2. Inspection of the clay at the ship's side was impossible for to use the language of Judge Hanford in deciding the case, "To determine the quality time, favorable con-

"ditions and special conveniences for testing are necessary "and these essentials make a fair inspection while the "ship is being discharged impracticable." It was therefore necessary for defendant to take the clay to its mill to test it. It had the right to accept such of it as corresponded with the sample or was suitable for its uses, and to reject the remainder and this either upon the theory that in a sale by sample there is an implied warranty that the bulk will be up to the sample, or upon the theory that the contract was not entire but divisible and that defendant was only obligated to accept such of the clay as was of the kind it had contracted for, and could reject the remainder. Hence the evidence relating to the tests, the uses to which the clay is put by the defendant, the kind that is suitable for such purposes etc. was proper.

3. The evidence relating to the custom of the trade in taking delivery of clay and in relation to the meaning of the trade term "delivery ex ship" was proper, but whether proper or not is immaterial because the trial court did not base its decision in whole or in part upon such testimony.

4. The answer was sufficient to raise all of the questions decided by the trial court; but even if this were not so it would now be deemed amended to conform to the proof.

SALE WAS BY SAMPLE

The correspondence between the parties clearly shows a sale by sample. The plaintiff's letter of September 29th

contains the statement "We send you under separate cover "a sample marked 'P. X. Y.' of an English China Clay." Nothing appears in the record to show that "P. X. Y." had any known meaning in the commercial world or in the trade or that it conveyed any meaning to the defendant. On the contrary it does appear that when the sample was received by the defendant, it tested it and found it suitable for its purposes, (bill of exceptions p. 10); and then entered its order for 300 to 400 tons of "P. X. Y." China Clay, to be fully equal to sample. (Defendant's exhibit 3 —Assignment of error No. 3). It also appears that when the clay arrived, the casks in which it was contained were not marked P. X. Y., and that the term "simply referred "to the samples of clay that had been submitted." (Bill of Exceptions p. 9). The memorandum contract entered into between the parties after the correspondence mentioned calls for "China Clay in casks P. X. Y. Brand." As "P. X. Y." had no meaning except that given to it by the parties in their correspondence, namely clay of a kind and quality corresponding to a submitted sample, it would seem that nothing could be clearer than that the correspondence is a part of the contract; or even if it is not a part of the contract, such correspondence was admissible to explain the meaning of a term used by the parties, which term without such explanation would be meaningless. In no event can it be said that the correspondence contradicts or varies the terms of the written contract.

If anything in addition to the correspondence already noted is necessary to show that this sale was by sample

it appears from the shipment itself. In addition to the fact that the clay or the casks in which it was contained was not branded P. X. Y. it is in evidence that a part of the shipment came from one mine and a part of it came from another mine and these parts differed radically and materially in the two essentials of China Clay, namely, color and amount of grit. Manifestly if one of these parts is P. X. Y. the other is not.

In a case where the seller after having shown a sample of berries contracted to sell "Standard No. 3 Berries", the Court instructed the jury in substance that if the seller at the time of taking the order for the berries exhibited samples thereof and represented that the berries purchased would correspond with such sample, and if the jury found "that defendant entered into the contract intro-"duced in evidence, and that the word 'Standard' used in "said contract does not designate any generally recognized "quality or quantity of blackberries among the trade then "they were instructed that the sample cases so exhibited "establishes the standard for the berries referred to in the "contract, and that if they should find that the black-"berries tendered by plaintiff in fulfillment of the con-"tract were inferior to those contained in said sample cans, "defendant had the right to reject the same," and this instruction was affirmed.

American Canning Co. vs. Flat Top Grocery Co., 70 S. E., 756.

EFFECT OF THE DELIVERY

The plaintiffs in error contend that whether the sale was by sample or not, and whether they furnished a P. X. Y. brand of clay or not, the defendant in error having taken the clay from the ship's side at Seattle is now precluded from making any objection to the quality of the commodity so taken by it. In other words the plaintiffs in error contend that although about one half of the clay shipped to the defendant was not what it bought and could not be used in its business, it was bound to keep the whole consignment and pay the contract price therefor. This contention ignores two elementary principles, one of which is that in every sale by sample there is an implied warranty that the goods will correspond to the sample, and the other which is more particularly applicable to this case is that when a vendor sells goods of a specified quality and undertakes to ship them to a buyer who has not seen them and delivers them in such a manner that the purchaser has no opportunity to examine them before delivery, the mere delivery does not bind the vendee to accept them; he has the right after such delivery to inspect them to ascertain whether they conform to the contract, and the right to inspect implies the right to reject such of them as are not of the quality required by the contract. In such a case the act of refusing to accept an article as not being in accordance with the terms of a previous executory agreement is one of insistence on, and not a rescission of, the contract. This is not a case in which the buyer of a specific lot of goods accepted and

used a part of them with full means of previously ascertaining whether they conform to the contract or not. Here the quality of the commodity sold could not be ascertained at the ship's side but had to be taken to defendant's mill or some similar place to be tested. Upon making the necessary test it was ascertained that about half of the quantity delivered was in accordance with the contract or fit for defendant's uses and the other half was entirely unfit for defendant's uses and not up to the standard required by the contract. Under these circumstances the defendant certainly had the right to retain so much of the shipment as was in accordance with the contract and to reject the rest.

The propositions just stated are well supported by the authorities. The Supreme Court of the United States has said:

"The authorities cited sustain this proposition: that "when a vendor sells goods of a specified quality, but not "in existence or ascertained, and undertakes to ship them "to a distant buyer, when made or ascertained and delivers "them to the carrier for the purchaser, the latter is not "bound to accept them without examination. The mere "delivery of the goods by the vendor to the carrier does "not necessarily bind the vendee to accept them. On their "arrival he has the right to inspect them to ascertain "whether they conform to the contract, and the right to "inspect implies the right to reject them if they are not "of the quality required by the contract."

Pope vs. Allis, 115 U. S., 373.

The Supreme Court of Michigan has held that where the character of the goods purchased is such that their

quality cannot be determined by looking at and examining them, but by actual use only, the purchaser will be entitled to a reasonable time in which to test the goods, and ascertain whether they are the kind ordered; and until this question is determined the retention of the goods does not amount to an acceptance thereof.

Phil. Whiting Co. vs. Detroit White Lead Works, 24 N. W., 881.

Every person who sells goods of a certain description undertakes as a part of his contract that the article delivered shall correspond to the description and is in fact an article of the special kind and quality expressed in the contract of sale and the purchaser has a right to rely upon the undertaking that the article is of the kind or quality ordered and presume it to be true that the article is the one or kind ordered.

Bagley vs. Cleveland Rolling Mill Co., 21 Fed., 159.

The contract sued upon was not entire but severable. This court has said:

"The modern American rule seems to be that a party "who has failed to perform in full his contract for the sale "and delivery of personal property may recover compen- "sation for the part actually delivered and received there- "under, less the damages occasioned by his failure to make "the complete delivery. Many of the cases establishing "this principle will be found cited in note 19, Sec. 1032, "2 Benj. Sales. In Richards v. Shaw, 67 Ill. 222, in which "the contract was to deliver 500 bushels of corn at a "specified price per bushel, and the seller delivered only

"391 bushels, for which he brought suit, the Court said "that, if the vendee received part of the goods sold under "an entire contract, and retained that part after breach, "this was a severance, and a suit would lie for the price, "but the buyer might deduct damages for the failure to "fulfill the residue of the contract. A contract for the "sale and delivery of a certain number of cattle, unlike "one for the building and completion of a house or other "structure, is severable in its nature, and there is no just "reason why, if the vendee accepts and appropriates to his "own use a portion of the property so contracted for, he "should not pay the stipulated price for such portion, less "the amount of damages sustained by him by reason of the "vendor's failure to make complete delivery."

Saunders vs. Short, 86 Fed., 225.

Applying the foregoing principle to this case the only question is whether the plaintiffs delivered more than 861 casks of clay of the character prescribed in the contract. The fact that the plaintiffs shipped with the clay of the character ordered by the defendant, other clays, would no more make the defendant liable for such other clays than if the casks had contained cement, or some other entirely foreign or distinct substance.

It is really not material whether the Court holds that the contract was entire or not. For the purposes of this argument it may be conceded that the contract was entire as to all clay of the character contemplated by the parties. No exact quantity of such clay was ordered by the defendant in error. The order was for 300 to 400 tons. It was not an order for a carload or several carloads or a ship load. Under the decision of this Court just

cited, if the plaintiffs in error had shipped to the defendand in error 100 tons of clay of the kind ordered instead of the 300 to 400 tons called for in the contract the defendant in error would have had to pay for the 100 tons, but if the plaintiffs in error in shipping the 100 tons had included in casks similar to those used for the clay, 200 tons of iron ore, no one would contend for a moment that the defendant in error would have to accept the clay and the iron ore or else reject both the clay and the iron ore. This illustration in regard to the iron ore is not far fetched because in the instant case about half of the clay shipped came from one mine and the remainder from another and different mine. The clay which came from one mine was substantially up to the sample and suitable for the defendant's uses, while the clay which came from the other mine was not up to the sample and was wholly unfit for the defendant's uses. The clay which came from one mine was as unfit for the defendant's uses as if it had been a quantity of iron ore.

To the effect that in a sale of the character involved in this case the seller could compel the buyer to pay for the portion of the shipment that was equal to the sample and that the buyer could accept the part equal to the sample and reject the remainder, see

Morris vs. Wibaux, 43 N. E., 837.

Holmes vs. Gregg, 28 Atl., 17.

Canton Lumber Co. vs. Liller, 68 Atl., 500.

To the effect that the act of refusing to accept that portion of the clay not in accordance with the sample is one of insistence on, and not a rescission of, the contract, see

Potsdamer vs. Kruse, 58 N. W., 983.

In this connection also, the Supreme Court of the United States has stated:

"When the subject-matter of a sale is not in existence, "or not ascertained at the time of the contract, an under- "taking that it shall, when existing or ascertained, pos- "sess certain qualities, is not a mere warranty, but a con- "dition, the performance of which is precedent to any "obligation upon the vendee under the contract; because "the existence of those qualities being part of the descrip- "tion of the thing sold becomes essential to its identity "and the vendee cannot be obliged to receive and pay for "a thing different from that for which he contracted."

Pope vs. Allis, 115 U. S., 373.

All that has been said herein as to the legal effect of the delivery as made, has been upon the assumption that no waiver of the ordinary legal effect of such delivery had been made; but it appears from the answer, and the proof conformed thereto, that whatever might be the ordinary legal effect of such delivery, an express waiver was made by the plaintiffs in error of their right to rely thereon, and our argument in relation to such waiver will be found in subsequent part of this brief under the sub-head "The Answer."

SPECIFICATIONS OF ERROR 7, 8 AND 12

There was a good deal of evidence as to the custom prevailing in the trade and at the port of Seattle in regard to inspection and delivery and examination of China clay, of all of which the plaintiffs in error complain. The terms in regard to delivery used in the contract were used by parties of long experience in the trade and the meaning which the terms used have in the trade should be controlling, and hence although quite unimportant to a proper decision of this case, was admissible. This testimony is to the effect that the acceptance of delivery of goods enclosed in cases or packages is deemed to apply only to the condition of the packages at the time they are received. As stated by Mr. Howarth (see assignment of error No. 12) "My understanding is that any apparent "defects which can be discovered at the ship's side must "be complained of at that time so that the rights of the "shippers have not been stopped as against the ship, if "there has been any apparent damage caused en route. "As far as examination of enclosed packages such as clay, "where the defects are not latent, (should be patent) and "where it needs considerable time and skill to make the "examinations, then the goods have always been permitted "to go up to the mill."

THE MEASURE OF DAMAGES

The trial court held that the measure of damages which the vendee may claim for breach of an implied warranty of quality is the difference between the actual value of the

property delivered and the higher value of the warranted quality, and if there is no other evidence of value the price agreed to be paid will be regarded as the value of the property of the quality warranted, and that in this case the defendant having offered to return the inferior clay and to hold it subject to disposition by the plaintiffs, the contract price is the measure of damages which it is entitled to recoup. To support this assignment of error (No. 14) the testimony of a witness in regard to a sale of a very small quantity of the rejected clay is cited. It will probably be only necessary to say that the rejected clay had no value to the defendant for the reason that it could not be used by it. In addition to that, however, it appears that the parties to this suit entered into a written stipulation which is in the record, (Trans. 26.) that the defendant without prejudice to the rights of the plaintiffs or the defendant in prosecuting or defending this suit, might sell the rejected clay "it being agreed and understood by this "stipulation that the sale may now be made to minimize "the daily accruing loss in value to the said clay, and "further that the proceeds of said sale shall be held for the "use and benefit of the person or persons entitled thereto "upon the final determination of the within named action." The small sale referred to was made pursuant to this stipulation.

THE ANSWER

Under assignment of error No. 13, the plaintiffs in error contend that the answer is insufficient to support

the defense tendered. In this case Federal jurisdiction is based solely upon the ground of diverse citizenship. The rules of pleading and proof in the State of Washington therefore are applicable. It is well established by the decisions of the Supreme Court of Washington that in trials before a Court where the evidence introduced at the trial is sufficient upon which to base the judgment rendered, if the pleading is defective, such pleading will be deemed to be amended to correspond with the proof; and it is also well established that where a cause has been tried upon its merits, as if upon pleadings sufficient in form and substance, in which the complaining party has not been misled, and has had full opportunity to present his case, some substantial wrong, some failure on the part of his adversary to aver or prove a material matter necessary on his part to be averred and proven in order to entitle him to recover, must be shown before the Appellate Court is warranted in reversing and remanding a cause for a new trial. A mere defect in pleading is not such a cause. The pleading must not only be defective but must have operated to the substantial injury of the complainant before that result can follow. Certainly no such injury is shown by this branch of the case of plaintiffs in error.

The answer, however, as a matter of law is sufficient. Defendant denies the contract pleaded in the complaint. Pleads a sale by sample; alleges that part of the shipment was up to sample and part of it was inferior thereto; that the defendant offered to return the inferior clay but the plaintiffs refused to accept it and that the value of the

clay up to the sample was so much, which amount the defendant tendered and kept its tender good.

If this court should decide that the defendant had a right to accept so much of the shipment as conformed to the sample and reject the remainder, then the answer is an absolutely good pleading. If this Court should decide that the defendant by accepting a part of the shipment will be deemed to have accepted all of the shipment, then the answer although the affirmative part thereof is not denominated a counterclaim, is nevertheless good because the ultimate facts upon which the defendant would be entitled to recoup damages are pleaded. In this respect the following language is quite applicable:

"It is next urged that defendant is not entitled to "recoup damages (after having accepted the machinery "purchased) for the breach of the warranty in question, "because the answer, in the language of counsel 'does not "count upon any breach of contract, nor allege that plain- "tiff has been damaged, nor pray for damages nor ask to "have damages sustained by it set off against the pur- "chase price.' * * * * The answer, as already seen, un- "doubtedly seeks to recoup damages sustained by defend- "ant by reason of alleged breach of the warranty made by "plaintiffs concerning the character of the workmanship "and material of the boilers in question. This answer was "not, in terms called a 'set off', or 'counterclaim,' or 're- "coupment,' and perhaps was not technically pleaded as "such; but, whatever it might have been styled, it was in "fact a statement of such facts as entitled the defendant "to diminish the plaintiffs' amount of recovery; and, even "if it be conceded that it was inartificially drawn, it was "never challenged by any motion to make it more specific

"or certain. But it was not, in our opinion, obnoxious to "any such criticism. The answer, especially under code "practice and pleadings, was entirely sufficient to entitle "the defendant to show, by way of reduction of plaintiffs' "recovery, the diminished value of the boilers in question, "occasioned by the defective workmanship or material "complained of."

Florence Oil & Refining Co. vs. Farrar, 109 Fed., 254.

In no event should this Court direct judgment to be entered for the plaintiffs in error. If this Court should hold the answer insufficient to admit the defense actually proven, and should further hold that the pleadings will not be deemed amended to conform to the proof, then we respectfully ask that in reversing the judgment the cause be remanded for a retrial with permission to the defendant to amend its answer.

In connection with the argument of counsel for plaintiffs in error to the effect that judgment should have been entered for the plaintiffs in error as demanded by reason of the character of the answer we desire to call the court's attention to paragraphs 3, 4, 5 and 6 of the answer (Transcript 8-9). It seems that it took some time to transport the clay from Seattle to the mill of the defendant in error at Everett. After some of the clay had been shipped to said mill and it was found that the total shipment contained two kinds of clay, there was still at the ship's side in Seattle, 253 casks. Referring to that state of affairs, the answer sets forth:

"At the time the defendant discovered that the plain-
"tiffs had included in the shipment clay of a grade inferior
"to sample there were still remaining on the dock of
"Galbraith & Bacon & Company at Seattle, Washington,
"two hundred and fifty-three (253) casks. This defend-
"ant promptly notified the plaintiffs that the shipment
"was not in accordance with sample, and after some cor-
"respondence, it was agreed between the parties that the
"defendant should take to its plant at Everett, the remain-
"ing two hundred and fifty-three (253) casks without
"admission of liability for the shipment and without ex-
"pense to it if defendant's claim as to the inferiority of the
"clay should be proved correct."

The statement quoted was certainly a sufficient pleading as to the waiver by the plaintiffs in error of plaintiffs' right to rely upon the taking of the clay from Seattle to Everett as a delivery of the consignment. If the legal effect of the delivery of the clay as made would be to require the defendant in error to accept and pay for it, the plaintiffs in error certainly had the right to waive its rights in that respect and the defendant in error in its answer pleaded that it did make such a waiver and the waiver was undoubtedly as to the whole shipment. In other words the plaintiffs in error shipped to the defendant in error, a commodity the quality of which could only be determined by testing it. After testing a part of the shipment it was discovered that a large part was not a commodity of the kind desired or ordered by the defendant in error. At that time a part of the shipment was still at the ship's side. The defendant in error thereupon promptly notified the plaintiffs in error of the result of its tests and

the whole shipment to its mill at Everett to await an adjustment of the differences which had arisen on account of defendant in error's claim that a large part of the clay was unfit for use. In substance the answer is, and the rejected the whole shipment. To minimize the loss that would fall upon the plaintiffs in error if it eventuated that there was included in the shipment a quantity of a kind of clay not contemplated by the contract of sale, the plaintiffs in error requested the defendant in error to take the whole shipment to its mill at Everett to await an adjustment of the differences which had arisen on account of defendant in error's claim that a large part of the clay was unfit for use. In substance the answer is, and the proof conformed to it, that the defendant in error rejected the entire shipment for the reasons heretofore appearing; that upon said rejectment the plaintiffs in error said to the defendant in error: "You take possession of this entire "shipment and we will either adjust the differences which "have arisen between us, amicably or in a lawsuit, and if "in a lawsuit you shall not be deemed to have waived "any of your rights to reject the unfit clay by reason of "your using that portion of the clay suitable for your "purposes."

Of the 253 casks which were at the ship's side in Seattle, at the time the defendant in error discovered the inferiority of a large part of the clay, 133 casks were of the poorer brand, and under no circumstances could the defendant in error be compelled to pay for these. For

these 133 casks the plaintiffs in error charged the defendant in error about Four hundred sixty-six Dollars ($466.00).

We respectfully submit that there was no error in the action of the trial court and respectfully pray that the decision and judgment be affirmed, with costs.

J. A. COLEMAN,

Attorney for Defendant in Error.